BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES K. CURRY Claimant VS. **DURHAM D & M, LLC** Respondent AND **OLD REPUBLIC INSURANCE CO.** Insurance Carrier	)	Docket No. 1,051,135

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the August 12, 2010, preliminary hearing Order for Compensation entered by Administrative Law Judge Brad E. Avery. Roger D. Fincher, of Topeka, Kansas, appeared for claimant. Kip A. Kubin, of Kansas City, Missouri, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant suffered an injury from a series of accidents that arose out of and in the course of employment. He found the date of accident to be June 10, 2010, the date of written notice to respondent, and accordingly, found notice to be timely. The ALJ ordered temporary total disability benefits to be paid commencing June 14, 2010, until further order, claimant has been certified as having reached maximum medical improvement, or claimant has returned to gainful employment. The ALJ further ordered respondent to provide claimant with medical treatment with Dr. Curtis.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 30, 2010, Preliminary Hearing and the transcript of the August 11,

2010, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.[1]

ISSUES

Respondent appeals the ALJ's finding that claimant sustained an injury or injuries in a series of accidents that arose out of his employment. Respondent also argues that claimant did not give timely notice of the accident or series of accidents. Respondent further argues that claimant is not entitled to temporary total disability benefits because he was terminated from his employment with respondent for cause.

Claimant argues that he sustained injuries in a series of accidents that arose out of and in the course of his employment at respondent and that he gave respondent timely notice of the accident.

The issues for the Board's review are:

(1) Did claimant sustain an injury or injuries in an accident or series of accidents that arose out of and in the course of his employment with respondent?

(2) If so, did claimant give respondent timely notice of his accident and/or series of accidents?

(3) Is claimant entitled to temporary total disability benefits if he has been terminated from his employment for cause?

FINDINGS OF FACT

Claimant was working for respondent as a school bus driver. He worked between 22 to 26 hours per week. On or about January 19, 2007, he slipped and fell on some ice in respondent's parking lot as he was walking to his vehicle after work. He claimed injuries to his right shoulder, right arm, both knees, and his low back. He initially received medical treatment for his injuries, including prescription medication. Eight to ten months later, however, respondent stopped paying for his prescriptions and did not pay for any more medical treatment. Claimant had begun using a cane sometime after the January 2007

[1] The Brief of Claimant to Kansas Workers Compensation Board refers to deposition testimony of Mr. Pepper. No such deposition transcript was in the file received from the ALJ. A review of the Division's records shows that the transcript of that deposition was not filed with the Division until October 19, 2010. As it was not considered by the ALJ in connection with his August 12, 2010, Order for Compensation, it will not be considered as part of the record in this appeal. See K.S.A. 2009 Supp. 555c(a).

fall, but he could not remember when he started using it.[2] Claimant filed an Application for Hearing on June 14, 2010, and an Application for Preliminary Hearing on June 18, 2010, for the 2007 slip and fall accident. This claim was assigned docket No. 1,051,134. A preliminary hearing was held in docket No. 1,051,134 in conjunction with the preliminary hearing for the series of accidents alleged in docket No. 1,051,135. Although the two docketed claims were consolidated for hearing, the ALJ issued separate orders. According to Division records and the parties' briefs to the Board, claimant's application for preliminary benefits in docket No. 1,051,134 was denied.

In the docketed case now before the Board, No. 1,051,135, claimant is claiming injuries he received from a series of accidents sustained starting January 5, 2008, through his last day worked, which was October 23, 2009.[3] In his Application for Hearing filed June 14, 2010, he claimed injuries to his "back, knees, shoulder, ribs, etc."[4]

Claimant testified that during the period from January 2008 until his last day worked he suffered a work-related worsening of his conditions that had originally resulted from his January 2007 fall. Sitting for long periods of time in the bus bothered him, as did driving on bumpy roads. Getting in and out of the bus caused his condition to worsen. Claimant testified that during the period from January 2008 through November 2009, he was on several medications, including Lortab, Prednisone and Naprosyn. He was using his cane more toward the end of his employment, and would use the cane to help him get into and out of the bus. He said he missed some work between January 2008 and his last day of work because of the pain in his back, knees or elbow, but he cannot remember how many days.

Between January 2008 and his last day worked, claimant reported to his supervisor, Clinton Pepper, that his back and knee were hurting. In January or February 2009, he told Mr. Pepper his back was hurting badly and asked if he could see someone about it. Claimant testified that Mr. Pepper said respondent was not paying for anything else. He believes the last time he spoke with Mr. Pepper about his back was around Halloween 2009. Claimant also testified that during the period from January 2008 until his last day worked he presented some prescription bills to Mr. Pepper asking that they be paid, but the bills were not paid by respondent.

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[2] The medical record from Dr. Donald Mead dated March 23, 2007, indicates that claimant was walking with a cane. P.H. Trans. (Aug. 11, 2010), Cl. Ex. 3 at 3.

[3] Claimant was placed on administrative leave as of October 23, 2009, and was terminated about a week later.

[4] Form K-WC E-1, Application for Hearing filed June 14, 2010.

By the time claimant was terminated in October or November 2009,[5] his low back and left knee were a lot worse than in 2007. His right elbow was better. He testified he was told by Dr. Leinwetter from the Shawnee County Health Department that his kneecap was out of position and he had five compressed vertebrae in his low back. He thinks this was in September or October 2009.

Claimant was examined by Dr. Lynn Curtis on June 15, 2010, at the request of his attorney. Claimant told Dr. Curtis that he was injured in December 2007[6] when he slipped and fell on the ice, injuring both his knees and his back. Claimant told Dr. Curtis that since 2007, he has had left knee and low back pain. He said that his right knee was fine as of the date of the examination. After examining claimant, Dr. Curtis assessed him with probable internal derangement of his left knee, low back injury consisting of fractures at L1 and L2, lumbar radiculopathy left L1 to L3, pain not controlled, and possible concussive state. Dr. Curtis recommended that claimant have an MRI of the left knee and x-rays of the back and left knee, followed by an evaluation with a spinal surgeon and an orthopedist. Dr. Curtis opined that claimant was temporarily totally disabled.

Claimant had been seen previously by Dr. Curtis on November 7, 2002, regarding a workers compensation injury that occurred on July 27, 2002, when claimant slipped and fell while working for a security firm. In that accident, claimant suffered injuries to his right wrist and elbow, his cervicothoracic spine, his lumbosacral spine, his left knee, his ribs, and a right oblique muscle contusion. Dr. Curtis opined that claimant's multiple injuries were the result of his fall at work. He did not find claimant to be at maximum medical improvement and recommended further treatment to claimant's spine, left knee, right hand, ribs, and right elbow, as well as pain management. However, claimant requested an impairment rating, which Dr. Curtis provided. This 2002 work injury was settled on January 9, 2003, on a strict compromise of all issues.

Claimant also injured both his knees, the right side of his neck, his upper back and his lower back in 1993 when he slipped and fell on ice while working for the State of Kansas as a law enforcement officer. He was evaluated by Dr. P. Brent Koprivica on April 26, 1994. At that time, claimant told Dr. Koprivica that he had been seen by Dr. David Beckley, who told claimant that his lower discs were compressed. Dr. Koprivica rated claimant with a 9 percent impairment to the body as a whole for injuries related to the accident in February 1993. Dr. Koprivica also rated claimant as having a 10 percent impairment to the right upper shoulder for injuries he suffered on January 2, 1994. On that

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[5] Claimant's attorney said he believed claimant's last day of work was on November 8, 2009, (P.H. Trans. [Aug. 11, 2010] at 5-6), but respondent's Exhibit H to the preliminary hearing indicates claimant was terminated October 28, 2009, for inappropriate conduct.

[6] Claimant admitted that he gave Dr. Curtis the wrong date of accident and that his slip and fall was, instead, in January 2007. Claimant is on Social Security disability, and has been since before he started working for respondent. He was accepted for disability because of memory loss and fibromyalgia.

date, claimant was closing a gate and the wind caught the gate, which caused his shoulder to pop. When asked about these events and Dr. Koprivica's examination, claimant said they were too far in the past for him to have any memory of them.

Claimant was terminated by respondent for inappropriate conduct on or about October 28, 2009. Claimant was accused of grabbing the shirt of a female coworker and trying to put a piece of candy down her shirt. Claimant has not worked since he was terminated by respondent, although he has applied for several jobs.

Clinton Pepper, respondent's safety training supervisor, testified that to his knowledge claimant did not tell him he had injured himself at work getting on and off the bus or riding on the bus. Mr. Pepper went through respondent's files and could find no accident report that claimant had made between 2008 and his termination in October 2009. Mr. Pepper did find the accident report claimant filled out in January 2007. He said claimant did not complain to him about any problems he was having doing his job after he was released from treatment by Dr. Mead after the January 2007 accident. Claimant had returned to work with no restrictions and had continued to do all his job duties until his termination on October 28, 2009. Mr. Pepper agreed that he had received a request for workers compensation to pay for prescription bills from Walgreens for Lortab in January 2009.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[7] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[8]

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[7] K.S.A. 2009 Supp. 44-501(a).

[8] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[9]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[10] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[11] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[12]

"A claimant's testimony alone is sufficient evidence of his own physical condition."[13] "Medical evidence is not essential or necessary to establish the existence, nature, and extent of a worker's injury."[14]

K.S.A. 2009 Supp. 44-508(d) states:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the

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[9] *Id.* at 278.

[10] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[11] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[12] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

[13] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 95, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001).

[14] *Graff v. Trans World Airlines*, 267 Kan. 854, 864, 983 P.2d 258 (1999).

> employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Respondent has cited the recent case of *Mitchell v. Petsmart, Inc.*,[15] where the Kansas Supreme Court stated:

> Kansas appellate courts have set as a bright-line rule that in repetitive microtrauma situations like carpal tunnel syndrome, the date of injury is the last day worked. See *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 855-57, 79 P.3d 1289 (2003). The Board's decision to set the date of accident for Mitchell's repetitive trauma injuries as his last day worked is in agreement with the

[15] *Mitchell v. Petsmart, Inc.*, __ Kan. __, 239 P.3d 51, (No. 99,528 filed September 10, 2010, slip op. at 25) (2010 WL 3516155).

> statute and our case law. We hold the Board correctly recognized the date of accident for Mitchell's subsequent injuries (other than the initial left thumb) as July 15, 2005, i.e ., Mitchell's last day of work for Petsmart.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.[16] This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.[17]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[18] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[19]

ANALYSIS

This claim is before the Board on an appeal from a preliminary hearing order. Therefore, there is no issue as to whether claimant's injuries are permanent or if he has increased permanent impairment over and above his earlier injuries. At this stage of the proceedings, even a temporary aggravation can be compensable. Claimant sought, and the ALJ awarded, medical treatment and temporary total disability compensation. Whether claimant is in need of medical treatment and whether claimant is temporarily and totally disabled are not issues that the Board has jurisdiction to review on an appeal from a preliminary order. The same is true for a finding regarding date of accident. The Board will not review a finding as to date of accident on an appeal from a preliminary hearing order except as may be necessary to determine a jurisdictional issue such as whether notice of accident was timely given.

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[16] K.S.A. 2009 Supp. 44-551.

[17] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

[18] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[19] K.S.A. 2009 Supp. 44-555c(k).

The ALJ interpreted K.S.A. 2009 Supp. 44-508(d)(1) in determining claimant's date of accident to be June 14, 2010. Respondent argues claimant's date of accident for his alleged series of accidents can be no later than his last day of work, which was on or about October 23, 2009. Claimant testified that he told Mr. Pepper, his supervisor, on several occasions before his last day worked that his condition was worse and that he needed medical treatment. The ALJ apparently found claimant's testimony credible, and this Board Member does as well. As such, claimant gave timely notice of his alleged series of accidents.

A claimant can testify as to his injuries and conditions. Expert testimony is not required. Claimant described how his regular work activities after his return to work following his slip and fall accident in 2007 aggravated his preexisting conditions, particularly his back and left knee. Again, the ALJ found claimant's testimony credible, and this Board Member does as well. Claimant suffered injuries to his back and knee by a series of accidents each and every working day through his last day of work for respondent.

CONCLUSION

(1) Claimant sustained personal injuries by a series of accidents that arose out of and in the course of his employment with respondent.

(2) Claimant gave respondent timely notice of his series of accidents.

(3) A termination for cause does not per se disqualify a claimant from receiving temporary total disability compensation.[20] On an appeal from a preliminary hearing order, the Board is without jurisdiction to review findings of whether claimant is temporarily and totally disabled.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order for Compensation of Administrative Law Judge Brad E. Avery dated August 12, 2010, is affirmed.

IT IS SO ORDERED.

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[20] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009); *Tyler v. Goodyear Tire & Rubber Company*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

Dated this _____ day of October, 2010.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge